12-75

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-75

RUTH CALDERON-CARDONA,

Petitioner-Appellant,

(*caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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—v.—

THE BANK OF NEW YORK MELLON, HSBC, STANDARD CHARTERED, DEUTSCHE BANK TRUST COMPANY AMERICAS, UBS AG, CITIBANK, N.A., BANK OF CHINA,

Consolidated-Defendants-Appellees,

—and—

JPMORGAN CHASE BANK, N.A., INTESA SAOPAOLO,

Respondents-Appellees.

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BRIEF FOR THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

Introduction and Interest of the United States

The United States submits this *amicus curiae* brief to address an issue of importance to the Government: whether the Terrorism Risk Insurance Act ("TRIA"), Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337 (2002), or 28 U.S.C. §§ 1610(g) and 1610(f)(1), authorize the attachment of assets that are not owned by a terrorist party. They do not.

The United States emphatically condemns the killings of American citizens Carmelo Calderon-Molina and Pablo Tirado-Ayala that give rise to this action, and has deep sympathy for the victims and their family members ("petitioners"), who have pursued legal action against the Democratic People's Republic of Korea and its Cabinet General Intelligence Bureau (collectively, "North Korea"). The United States remains committed to aggressively pursuing those responsible for violence against U.S. nationals. The Government also, however, has a strong interest in ensuring that courts properly interpret TRIA and other provisions that address when victims of terrorism may attach assets of foreign sovereigns.

TRIA and other provisions at issue in this appeal operate against the backdrop of United States economic sanctions programs, which serve as an important tool of foreign affairs and national security. Sanctions programs may block property in which a target individual, entity, group of individuals or entities, foreign government, or even an entire nation (including all of its citizens) have any interest of any nature whatsoever. *See, e.g.*, 31 C.F.R. §§ 510.201(a), Appendix A § 1 (prohibiting all transactions prohibited pursuant to Executive Order 13,466); Executive Order 13,466 (73 Fed. Reg. 36,787, 36,787 (June 26, 2008) (blocking order currently applicable to North Korea, which applies to certain property and property interests of North Korea and North Korean nationals); *see also, e.g.*, 31 C.F.R. §§ 515.201(a), 515.305 (barring transactions that "involve property in which" Cuba and Cuban nationals have "had any interest of any nature whatsoever, direct or indirect"). Normally, unless a person obtains a license from the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC"), that person is barred from attaching assets that are blocked. This licensing system lets the Executive Branch exercise control over access to blocked assets in order to effectuate U.S. policy interests.

Implementation of both TRIA and section 1610(g) thus can have important consequences for the Executive Branch's implementation of United States economic sanctions programs in the national interest. Further, because these provisions affect foreign states and entities with assets in the United States, judicial interpretations of these statutes also can significantly impact the nation's foreign policy interests.

The district court correctly enforced a textual limitation contained in both TRIA and section 1610(g), which are not identical in all respects but which each permit attachment or execution only against certain property "of" covered judgment debtors against whom a terrorism victim holds a judgment. As the district court recognized, both the statutes' plain meaning and case law construing similarly worded statutes demonstrate that TRIA and section 1610(g) alike permit attachment only of assets owned by the terrorist party or its agency or instrumentality—and do not extend further to permit attachment of *any* assets blocked under the relevant OFAC sanctions regulations, which include both property and *property interests* of the terrorist party (as well as of North Korean nationals). E.O. 13,466 § 1.

The Court also should affirm the district court's rejection of petitioners' arguments under sections 1605A and 1610(f)(1). Although section 1610(f)(1) appears to aid petitioners by permitting attachment of "any property with respect to which financial transactions are prohibited or regulated" under statutes applicable here, section 1610(f)(3) authorizes the President to waive this provision in the interest of national security, and President Clinton did so. Petitioners' reliance on a separate, newer modification of TRIA that limits waivers of TRIA's provisions is misplaced, because that enactment does not diminish application of the waiver provision to attachment applications under section 1610(f).

The United States takes no position on additional issues litigated below.

Questions Presented

1. Whether TRIA—which permits terrorism victims to enforce judgments by attaching blocked property "of" a terrorist party—authorizes attachment of assets in which a terrorist party has no ownership interest.

2. Whether 28 U.S.C. § 1610(g), which applies to property "of" certain foreign states, authorizes attachment of assets in which the relevant state has no ownership interest.

3. Whether 28 U.S.C. § 1610(f)(1) authorizes petitioners to attach the blocked assets at issue, notwithstanding then-President Clinton's still-in-force waiver of that provision.

Statement of Facts

A. Statutory and Regulatory Background

1. Statutes Authorizing Sanctions and the North Korean Sanctions Regulations

The United States' economic sanctions programs generally arise under either or both of two statutes.

Since the issuance of Executive Order 13,466 on June 26, 2008, various property and interests of North Korea and North Korean nationals have been blocked under the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1701 *et seq.*, which allows the President to restrict various transactions in response to an "unusual and extraordinary" foreign policy, national security, or economic threat to the United States. 50 U.S.C. § 1701; *see also* Executive Order 13,466, Section 1 (with certain exceptions, "the

following are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in: all property and interests in property of North Korea or a North Korean national that . . . were blocked as of June 16, 2000, and remained blocked immediately prior to the date of this order.").* The applicable regulations prohibit all transactions prohibited by Executive Order 13,466. 31 C.F.R. § 510.201.

2. The FSIA

The Foreign Sovereign Immunities Act ("FSIA") provides that a "foreign state" is "immune from the jurisdiction" of federal and state courts except as provided by the exceptions to immunity in 28 U.S.C. §§ 1605-1607. *See* 28 U.S.C. § 1604. Those statutory exceptions generally "codify the restrictive theory of sovereign immunity," retaining immunity for sovereign or public acts, but abrogating immunity in suits arising from state commercial activities. *Samantar v. Yousuf*, 130 S. Ct. 2278, 2285 (2010).

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* Previously, property blocked pursuant to Section 1 of E.O. 13,466 had been blocked pursuant to regulations promulgated under the Trading With the Enemy Act ("TWEA"), 50 U.S.C. app. § 1 *et seq.*, which then constituted the statutory authority underlying sanctions relating to North Korea. *See* 31 C.F.R. Part 500 (2008). TWEA authorizes the President in certain conditions to impose embargoes on foreign nations. *See generally Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dep't of the Treasury*, 638 F.3d 794, 795-96 (D.C. Cir. 2011).

Originally, the FSIA did not abrogate a state's immunity in cases involving torture or extreme abuse outside the United States. *See Saudi Arabia v. Nelson*, 507 U.S. 349, 362-63 (1993). In 1996, however, Congress amended the FSIA to include the so-called "terrorism exception" to sovereign immunity, which was codified at 28 U.S.C. § 1605(a)(7) (2000). Under that since-superseded exception, a foreign state could lose its immunity in certain terrorism-related lawsuits if the Secretary of State had designated it as a state sponsor of terrorism. *See id.*

The FSIA also addresses the kinds of foreign sovereign property that can be attached by judgment creditors. The general rule is that a foreign sovereign's property is immune, subject to several exceptions. *See* 28 U.S.C. § 1609.

One such exception, codified at 28 U.S.C. § 1610(f)(1), was enacted in 1998 to benefit certain terrorism victims. Under its provisions, and "[n]otwithstanding any other provision of law," "any property with respect to which financial transactions are prohibited or regulated" under TWEA or IEEPA could be subjected to execution to satisfy "any judgment relating to a claim for which a foreign state (or an agency or instrumentality of such state) claiming such property is not immune" under 28 U.S.C. § 1605(a)(7) (2006). 28 U.S.C. § 1610(f)(1). In the same legislation, however, Congress authorized the President to "waive" section 1610(f)(1) "in the interest of national security." Pub. L. No. 105-277, § 117(d), 112 Stat. 2681 (1998). President Clinton did so the same day he signed the provision into law. *See Presidential Determination 99-1*, 63 Fed. Reg. 59,201, 1998 WL 34332050 (Oct. 21, 1998).

And after Congress subsequently codified this waiver authority, *see* 28 U.S.C. § 1610(f)(3), President Clinton again waived the entirety of section 1610(f)(1)'s attachment remedy. *See Presidential Determination 2001-03*, 65 Fed. Reg. 66,483, 2000 WL 34508240 (Oct. 28, 2000) (superseding 1998 waiver). No President has rescinded this waiver.

3. TRIA

In 2002, Congress passed TRIA, Pub. L. No. 107-297, 116 Stat. 2322 (2002), *reprinted in relevant part at* 28 U.S.C. § 1610 note, which governs post-judgment attachment proceedings in certain cases arising out of terrorist acts. As originally enacted, TRIA states:

> Notwithstanding any other provision of law . . . , in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under [28 U.S.C. § 1605(a)(7) (2000)], the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

TRIA § 201(a). TRIA defines "blocked asset" as "any asset seized or frozen by the United States" under

specified provisions of IEEPA or section 5(b) of TWEA. TRIA § 201(d)(2)(A).*

Through section 201(a), TRIA permits certain attachments of property that might otherwise have been precluded by the sovereign immunity provisions of the FSIA. *See Bennett v. Islamic Republic of Iran*, 618 F.3d 19, 21 (D.C. Cir. 2010). TRIA also allows terrorism victims attaching assets to bypass otherwise-applicable prohibitions on transactions involving blocked assets absent an OFAC license. *See* 31 C.F.R. § 510.201(a); Executive Order 13,466 (73 Fed. Reg. 36,787 (June 26, 2008) (restrictions affecting blocked North Korean assets)); *see also, e.g.*, 31 C.F.R. §§ 515.201, 515.310, 515.512(c) (Cuban Assets Control Regulations ("CACR")) (generally prohibiting attachment without a license); *id.* §§ 594.201, 594.202(e), 594.312, 594.506(d) (Global Terrorism Sanctions Regulations) (same).

4. Post-TRIA Legislation Including 28 U.S.C. §§ 1605A and 1610(g)

In 2008, Congress repealed section 1605(a)(7)'s terrorism exception to immunity. *See* National Defense Authorization Act for Fiscal Year 2008 ("NDAA"), Pub. L. No. 110-181, § 1083(a), (b)(1)(A)(iii) and (3)(D), 122 Stat. 338-341 (2008). In its place, Congress enacted section 1605A. Like its predecessor, the new section

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* TRIA excludes from the definition of "blocked asset" certain property not at issue here, including property "subject to a license" issued by the United States for specified purposes. *See* TRIA § 201(d)(2)(B)(i). Certain categories of diplomatic or consular property are also excluded. *See id.* § 201(d)(2)(B)(ii).

abrogated foreign states' sovereign immunity from damages suits arising from terrorist acts. *See* 28 U.S.C. § 1605A(a). In addition, the new section expressly created a private right of action for U.S. citizens injured by state sponsors of terrorism. *See id.* § 1605A(c).*

At the same time, Congress also enacted a provision concerning remedies for plaintiffs who hold a section 1605A judgment against a foreign state. *See* 28 U.S.C. § 1610(g). Section 1610(g)(1) permits a plaintiff to attach "the property of a foreign state against which a judgment is entered under section 1605A . . . " if the targeted property is used in commercial activity in accordance with the requirements of sections 1610(a) and (b), even if the property is owned by an agency or instrumentality of the foreign state. *Id.* Such property is not immune from attachment even if it is regulated under TWEA or IEEPA. *Id.* § 1610(g)(2). However, section 1610(g) expressly does not "supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable" under the judgment a plaintiff is executing. *Id.* § 1610(g)(3).

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* This overrode the D.C. Circuit's ruling in *Cicippio-Puleo v. Islamic Republic of Iran*, which held that section 1605(a)(7) does not create a private right of action. *See* 353 F.3d 1024, 1032-33 (D.C. Cir. 2004). *See Rux v. Republic of Sudan*, 672 F. Supp. 2d 726, 732 (E.D. Va. 2008).

B. Factual and Procedural Background

1. Underlying Claims and Judgment for Petitioners

Petitioners are the families and estates of Carmelo Calderon-Molina and Pablo Tirada-Ayala, two American citizens who were, respectively, killed and injured in a 1972 terrorist attack in Israel. (JA 89.3).*

The victims' families and estates sued North Korea on March 27, 2008, in the United States District Court for the District of Puerto Rico, alleging that North Korea provided material support to the terrorists. (JA 89.3). Defendants did not appear in the action. (JA 89.4). On July 16, 2010, the district court entered a $378 million judgment for the families, and on August 5, 2010, the district court entered an amended judgment. *See Calderon-Cardona v. Democratic People's Republic of Korea*, 723 F. Supp. 2d 441, 460-85 (D.P.R. 2010) (JA 89.1, 92).

2. Judgment Collection Proceedings in the Southern District of New York

On October 8, 2010, petitioners registered the judgment in the United States District Court for the Southern District of New York. (JA 91). There, having identified a number of electronic fund transfers

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* Citations in the form (JA __) refer to the Joint Appendix, and citations in the form (SPA __) refer to the Special Appendix.

("EFTs")* that were blocked pursuant to Executive Order 13,466, petitioners filed a number of "turnover" petitions requesting orders directing various respondent banks to turn over the proceeds of these blocked EFTs pursuant to section 201 of TRIA, section 1610(g) of the FSIA, and N.Y. C.P.L.R. §§ 5225(b)) and 5227. (JA 1, 16, 26, 36, 46, 56, 66).

3. The District Court's Ruling and Entry of Judgment

In an Opinion and Order dated December 7, 2011 (SPA 1), the district court held that petitioners failed to demonstrate entitlement to relief under TRIA, the FSIA, or state law, and so denied their petitions for turnover of blocked EFTs. (SPA 43).

The district court held, first, that North Korea was not a "terrorist party" and that, therefore, petitioners' judgment did not lie against a "terrorist party" as is required for TRIA section 201 to apply. (SPA 10-23).

Further, the district court held, petitioners also "cannot attach the blocked EFTs because these accounts do not constitute 'blocked assets of [North Korea].'" (SPA 23). As the district court noted, TRIA requires both that the assets sought to be attached be "blocked assets" and also be "of that terrorist party." (SPA 23 (quoting TRIA § 201)). Applying this Court's

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* This Court has explained how EFTs work; in essence, EFTs effect transfers between accounts, using intermediary banks if the originator's and beneficiary's banks differ and are not in the same banking network. *See Export-Import Bank of the United States v. Asia Pulp & Paper Co.*, 609 F.3d 111, 115 (2d Cir. 2010).

holding in *Export-Import Bank*, 609 F.3d at 117, the district court used a "two step method of analysis" (SPA 24) under which, first, the court looks to state law to determine what property interest the judgment debtor has in the property at issue; and second, the court looks to federal law to determine whether those " 'state-delineated rights constitute a[n] . . . interest in property sufficient to trigger application' " of the relevant statute. (SPA 25). Applying Article 4-A of New York's Uniform Commercial Code ("U.C.C.") and prior rulings of this Court, the district court held that "the interest of an originator or a beneficiary in a midstream EFT falls short of property ownership." (SPA 25).

Further, the district court rejected petitioners' contention that TRIA pre-empts the U.C.C. or otherwise authorizes attachment of blocked EFTs, holding that TRIA's language does not include "language or definitions" that create a property right or define property "ownership" for purposes of TRIA. (SPA 26-38). Similarly, the district court observed, while OFAC's regulations delineate " 'transactions' that are 'prohibited' and thus subject to blocking by OFAC," those regulations "do not establish a terrorist party's substantive property rights to defined assets." (SPA 32-33). After closely reviewing relevant case law including a decision being reviewed by this Court in tandem with this appeal, *Hausler v. JP Morgan Chase Bank*, 740 F. Supp. 2d 525, 533-34 (S.D.N.Y. 2010), the district court held that neither TRIA nor OFAC's regulations preempt state law, and rather concluded that "state law . . . giv[es] meaning to the phrase 'of that terrorist party.' " (SPA 37). Finally with respect to TRIA, the district court held, "[e]ven if one were to assume . . . that TRIA § 201 *does* pre-empt state law," TRIA's "plain

language dictates that not all 'blocked assets' are attachable," and says nothing about property "ownership" or about what property is "'of' a designated foreign country." (SPA 37). Because petitioners "cannot, and therefore do not" claim property ownership by North Korea in the blocked EFTs at issue, the district court held, their TRIA claims fail.

Turning to 28 U.S.C. § 1610(g), the district court observed that, "[l]ike TRIA § 201," section 1610(g) "'creates no property rights but merely attaches consequences, federally defined, to rights created under state law.'" (SPA 39 (*quoting Export-Import Bank*, 609 F.3d at 117)). Because in key part section 1610(g) permits attachment of "*property of*" a "foreign state against which a judgment is entered under section 1605A," "petitioners cannot attach the blocked EFTs under FSIA § 1610(g) because neither North Korea no[r] any of its agencies or instrumentalities owns this property." (SPA 40). Rejecting petitioners' other contentions as inconsistent with section 1610(g)'s "plain meaning" (SPA 40-41), and rejecting preemption arguments as even weaker under section 1610(g) than under TRIA given section 1610(g)'s omission of TRIA's "notwithstanding" clause, the district court rejected "petitioners' FSIA claim." (SPA 42).

Judgment was entered for respondents on December 8, 2011. (SPA 43, 44). Petitioners appealed. (SPA 47).

Summary of Argument

Petitioners seek to satisfy a judgment against North Korea by attaching blocked EFTs held by various New York banks. The district court correctly concluded,

among other holdings, that the EFTs were not subject to attachment under TRIA or FSIA section 1610(g), because petitioners could not show that the blocked EFTs were property "of that terrorist party" as TRIA's text requires, or "property of" North Korea as section 1610(g)'s text requires. Well-established case law confirms that statutory references to property "of" a party concern only property or property interests owned by that party.

Further, and consistent with the district court's ruling, nothing in TRIA gives judgment creditors a property interest in blocked assets greater than that of the terrorist party itself, and nothing in TRIA purports to subject property wholly owned by third parties to attachment. Had Congress intended otherwise, Congress could and would have said so directly. Thus, the scope of attachment authorized by TRIA is not coextensive with the scope of the North Korea Sanctions Regulations or other sanctions regimes, many of which pre-date TRIA. Where they involve a blocking component, these regulations generally apply not only to assets of the sanctioned state, but also to property in which that state, and in some cases one of its nationals, has had "any interest of any nature whatsoever, direct or indirect." *See, e.g.,* 31 C.F.R. § 515.201(a) (CACR, which predate TRIA), *id.* § 500.201(a) (identical language in pre-2008 Foreign Assets Control Regulations, which applied to North Korea). Congress used far less expansive language in TRIA, even though it was presumably aware that OFAC regulations often encompass assets in which a foreign state or person has only an attenuated interest falling short of an ownership interest.

The statutory language reflects a legislative choice to focus TRIA attachment on the terrorist party itself, and not to authorize the unpredictable, varied, and potentially problematic effects that could arise if TRIA were read more broadly. To apply TRIA's attachment provisions to the assets of third parties would improperly disregard this legislative determination, thereby both departing from the statute's text and causing harms including imposing potentially heavy costs on non-terrorist property owners whom Congress did not contemplate as sources for collection under TRIA.

For similar reasons, the Court should reject petitioners' interpretation of section 1610(g). Like TRIA, that provision uses language that requires ownership, authorizing certain judgment creditors to attach "property of" certain foreign states used in commercial activity in the United States. As the district court recognized, the mere fact that the midstream EFTs at issue are blocked does not establish that they are the "property of" North Korea, and, thus, the district court correctly rejected the contention that the mere fact that the EFTs were blocked necessarily established that they were available for attachment under section 1610(g).

Finally, the Court should reject petitioners' reliance on 28 U.S.C. § 1610(f)(1), because that provision was waived by then-President Clinton pursuant to statutory authority, and that waiver remains in effect. Enactment of TRIA did not disturb this waiver as to section 1610(f).

ARGUMENT

POINT I

TRIA AUTHORIZES ATTACHMENT ONLY OF PROPERTY IN WHICH A TERRORIST PARTY HAS AN OWNERSHIP INTEREST

TRIA provides that "[n]otwithstanding any other provision of law," a victim of terrorism who has a judgment against a terrorist party may attach "the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party)." TRIA § 201(a) (28 U.S.C. § 1610 note).* Thus, under TRIA, petitioners must

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* Petitioners' money judgment was obtained under 28 U.S.C. § 1605A. (JA 89.2). The United States recently filed a brief at the Supreme Court's invitation in *Bank Melli Iran v. Weinstein*, arguing that TRIA is categorically unavailable to plaintiffs who have a section 1605A judgment against a state sponsor of terrorism, and that such plaintiffs' sole attachment remedy arises under section 1610(g). *See Bank Melli Iran v. Weinstein*, No. 10-947, Brief for United States as Amicus Curiae, 2012 WL 1883085 (May 24, 2012). Since then, however, Congress amended TRIA and added language indicating that it is applicable to section 1605A judgment holders. *See* Iran Threat Reduction and Syrian Human Rights Act of 2012, Pub. L. No. 112-158, § 502(e) (Aug. 10, 2012). In light of this amendment, we do not here advocate that petitioners are categorically excluded from invoking TRIA because they hold a section 1605A judgment.

demonstrate that the blocked EFTs at issue are the assets "of" North Korea. The district court correctly concluded that petitioners accordingly had to show North Korean ownership of the blocked assets in question. (SPA 38). It is insufficient merely to show that the EFTs are blocked under E.O. 13,466 and OFAC's implementing regulations, which block certain property and property interests of North Korea and North Korean nationals. E.O. 13,466 § 1.

This is so because the language of TRIA section 201(a) does not extend as broadly as the language of OFAC's blocking regulations, which existed before Congress enacted TRIA. Whereas TRIA states that a qualifying victim of terrorism may attach "the blocked assets *of* that terrorist party (including the blocked assets *of* any agency or instrumentality of that terrorist party)," TRIA § 201(a) (emphases added), TRIA does not employ the more expansive terms used in numerous OFAC blocking regulations. *See, e.g.*, 31 C.F.R. § 515.201 (applicable to property in which Cuba or a Cuban national has had "any interest of any nature whatsoever"); *id.* §§ 538.201, 538.307 (applicable to property in which Sudanese government has "an interest of any nature whatsoever"); *id.* §§ 594.201, 594.306 (blocking property in which various specially designated global terrorists have "an interest of any nature whatsoever").

While E.O. 13,466 uses a slightly different formulation ("property or property interests of North Korea or a North Korean national") to describe the property subject to blocking, OFAC regulations make clear that "property and property interests" of North Korea is a broader category than property owned by

North Korea. *See* 31 C.F.R. § 510.307 (expansively defining "property and property interest"). Moreover, given that E.O. 13,466 was intended to preserve in effect the blocking of certain property pursuant to prior sanctions against North Korea implemented through the Foreign Assets Control Regulations, its scope should be read to be coextensive with the scope of those regulations at least as to then-blocked property; those regulations blocked property in which North Korea or a North Korean national has had "any interest of any nature whatsoever, direct or indirect." 31 C.F.R. § 500.201(a) (2008).

When it enacted TRIA, Congress was presumably aware of the more expansive language used in such regulations, *see, e.g.*, *Townsend v. Benjamin Enterprises, Inc.*, 679 F.3d 41, 62 n.2 (2d Cir. 2012) (concurring opinion; when Congress legislated, it "was surely well aware" of operation of relevant pre-existing regulations); *cf. Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (Congress presumptively aware of judicial or administrative interpretations of statute and adopts interpretation by re-enacting statute), and this Court should not effectively amend the statute to incorporate the broader language that Congress chose not to employ.

Case law in a variety of contexts supports the intuitive conclusion that assets "of" North Korea are a narrower category than "property or property interests of" North Korea, or assets in which North Korea has had "any interest of any nature whatsoever." The Supreme Court has repeatedly observed that the " 'use of the word 'of' denotes ownership.' " *Board of Trustees of Leland Stanford Junior University v. Roche*

Molecular Systems, Inc., 131 S. Ct. 2188, 2196 (2011) (quoting *Poe v. Seaborn*, 282 U.S. 101, 109 (1930)); *see also id.* (describing *Flores-Figueroa v. United States*, 556 U.S. 646, 648, 657 (2009), as treating the phrase "identification [papers] of another person" as meaning such items belonging to another person); *Ellis v. United States*, 206 U.S. 246, 259 (1907) ("the most natural meaning of 'of the United States' is 'belonging to the United States.' "). Applying that understanding to patent law, the Court in *Stanford* concluded that "invention of the contractor" is naturally read to mean "invention owned by the contractor" or "invention belonging to the contractor." 131 S. Ct. at 2196.

In contrast, in *United States v. Rodgers*, the Court held that the IRS could execute against property in which a tax delinquent had only a partial interest, but the relevant statute permitted execution with respect not only to "any property . . . *of* the delinquent," but also to property "*in which* he has *any* right, title, or interest." 461 U.S. 677, 692-94 (1983) (quoting 26 U.S.C. § 7403(a) (emphases added)). The Court found this broader second clause important. *Id.* TRIA, of course, omits any such additional phrase, instead applying only to blocked assets "of" a terrorist party. *See* TRIA § 201(a).

Petitioners' proposed reading would also expand the statute well beyond common law principles regarding execution of a judgment against property in the possession of a third party. As both the majority and the dissent recognized in *Rodgers*, it "is basic in the common law that a lienholder enjoys rights in property no greater than those of the debtor himself; . . . the lienholder does no more than step into the debtor's

shoes." *Rodgers*, 461 U.S. at 713 (Blackmun, J., concurring in part and dissenting in part); *see also id.* at 702 (majority op.) (implicitly agreeing with this description); 50 C.J.S. Judgments § 787 (2012) ("a judgment creditor cannot acquire more property rights in a property than those already held by the judgment debtor" (citations omitted)). Congress enacted TRIA against the background of these principles, and the legislation should be interpreted to be consistent with them. *See United States v. Pacheco*, 225 F.3d 148, 157 (2d Cir. 2000) (" 'Congress will be presumed to have legislated against the background of our traditional legal concepts. . . .' " (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978))). Petitioners' interpretation would violate these principles by letting a judgment creditor attach an entire asset, and not just the judgment debtor's interest.

Finally, petitioners' broad reading does not advance TRIA's aim of punishing terrorist entities or deterring future terrorism. As Senator Harkin observed, "making the state sponsors [of terrorism] actually lose" money will tend to deter future terrorist acts. 148 Cong. Rec. S11,527 (daily ed. Nov. 19, 2002) (statement of Sen. Harkin). Yet paying judgments from assets that are *not* owned by the terrorist party does not impose a cost on the terrorist party. It does, however, impose a heavy cost on non-terrorist property owners—and not a cost that Congress demonstrably chose to impose.

The district court correctly rejected petitioners' arguments for many of these reasons (SPA 23-38), and, further, correctly rejected the decision being appealed in tandem with this case, *Hausler v. JP Morgan Chase*

Bank, 740 F. Supp. 2d 525 (S.D.N.Y. 2010). As the district court noted, a contrary holding would lead to the odd conclusion that Congress had authorized attachment of "property in which *any* North Korean 'national' has 'any interest of any nature whatsoever, direct or indirect.' " (SPA 32). That assets of foreign nationals are subject to a blocking regulation does not necessarily make those assets the property of the sanctioned nation.

Moreover, some blocking regimes are not directed at an individual terrorist entity, and are instead directed at certain categories of terrorist entities—many of which have nothing to do with each other. For instance, hundreds of different terrorist entities and individuals have their assets blocked under Executive Order 13,224, 66 Fed. Reg. 49,079 (Sept. 25, 2001). *See* 68 Fed. Reg. 34,196 (June 6, 2003); OFAC, *Terrorism: What You Need To Know About U.S. Sanctions* (hereinafter "*Terrorism*"), http://www.treasury.gov/resource-center/sanctions/Programs/Documents/terror.pdf, at 2-24 (last visited Sept. 19, 2012). Entities currently blocked under this program include such diverse groups as the FARC (a Colombian narco-terrorist organization, *see Tamara-Gomez v. Gonzales*, 447 F.3d 343, 345 (5th Cir. 2006)), the Tamil Tigers (a violent Sri Lankan rebel group, *see Don v. Gonzales*, 476 F.3d 738, 739 (9th Cir. 2007)), and Al-Qaida. *Terrorism* at 2, 54. The *Hausler* district court's logic would suggest that an individual with a judgment against one of these entities could attach assets wholly owned by an entirely separate group, half a world away, solely because both have their assets blocked under the same broad sanctions regime. It is highly unlikely that Congress intended such a result.

While these considerations alone foreclose petitioners' contentions under TRIA, the *Hausler* district court further erred by mischaracterizing the relationship between OFAC sanctions regimes and existing sources of property law, and based on that misunderstanding concluded that TRIA's reference to OFAC's sanctions preempted concepts of state property law. While the Government takes no position here on TRIA's preemptive force (an issue also addressed by the district court in this case),* we note that OFAC's regulations do not attempt to define what makes particular assets "of" or "owned by" a terrorist party. Instead, while OFAC's regulations contain definitions for terms like "property" and "interest," *see, e.g.*, 31 C.F.R. §§ 510.304, 515.307, 515.311, 515.312, 535.311, 535.312, those definitions' purpose is to explain the kinds of assets that come within OFAC's blocking orders—orders that extend beyond assets owned by the relevant sanctions target. *See, e.g.*, E.O. 13,466 § 1, 31 C.F.R. § 510.201(a) (barring transactions in certain "property and property interests" of North Korea or North Korean nationals); *id.* § 515.201 (regulations related to Cuba). These purposes are unrelated to

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* Although the United States has not taken a position on TRIA's possible preemptive force, one court, which recently held TRIA attachment unavailable in a similar case for reasons essentially identical to those the Government advances here, did hold that federal legislation preempts state attachment law, and applied a federal common law of attachment. *See Estate of Heiser v. Islamic Republic of Iran*, __ F. Supp. 2d __, 2012 WL 3776705, at *13-*18 (D.D.C. Aug. 31, 2012).

TRIA's attachment authorization, and so are irrelevant in construing how section 201 operates.

Finally, the *Hausler* district court also was mistaken in believing that its conclusions were needed to ensure uniform outcomes, *i.e.*, that TRIA outcomes do not differ based on the forum state. If TRIA did preempt state law in any respect, and if such uniformity were a concern, courts could achieve the desired uniformity by developing federal common law or its functional equivalent to govern attachment, without disregarding common law norms of attachment, and without misconstruing TRIA's language as calling for an expansion of collection remedies to the outer bounds of whatever is blocked under the relevant IEEPA or TWEA program. *See, e.g.*, *Burlington Indus. v. Ellerth*, 524 U.S. 742, 754-55 (1998) (where Congress instructed that Title VII was to incorporate principles of agency, "a uniform and predictable standard must be established as a matter of federal law"); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989) (in construing federal statute that uses common law terms, court relied on "general common law of agency, rather than on the law of any particular State").* There is no need—and no justifiable basis—to force OFAC's regulations into serving a role they were not intended

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* If a Court concluded that it did need to look to federal common law, as the D.C. District recently did in *Estate of Heiser*, it could do so through means other than the misapplication of OFAC regulations. The Uniform Commercial Code would presumably constitute a particularly relevant source.

to perform, and the *Hausler* district court's having done so was error.

POINT II

LIKE TRIA, SECTION 1610(g) AUTHORIZES ATTACHMENT ONLY OF PROPERTY OWNED BY A QUALIFYING FOREIGN STATE

As the district court recognized (SPA 38-40), section 1610(g) applies only to "the property *of* a foreign state" (emphasis added), much like TRIA authorizes attachment only of assets "of" the judgment debtor in question (there, a "terrorist party"); *cf.* 28 U.S.C. § 1610(a), (b) (certain property in the United States "of" a foreign state or agency or instrumentality not immune from attachment). And since the word "of" denotes ownership, *see supra* at 17-19, the statute necessarily reaches only property or interests in property that the judgment debtor owns. *See Estate of Heiser*, 2012 WL 3776705, at *11-*12. If Congress had intended the statute to more broadly reach all property in which the judgment debtor had any interest, it would have used broader language—like that in OFAC's regulations. Indeed, whereas TRIA includes a "notwithstanding" clause that petitioners (incorrectly) argue overcomes TRIA's ownership requirement, neither section 1610(g) nor the FSIA as a whole has any such provision.

Legislative history confirms this interpretation of section 1610(g). The conference committee report explained that the provision applies to "any property in which the foreign state has a beneficial *ownership*." H.R. Rep. No. 110-477, at 1001 (2007) (conf. rep.) (emphasis added); *accord id.* (the provision "is written

to subject any property interest in which the foreign state enjoys a beneficial *ownership* to attachment and execution" (emphasis added)).*

Petitioners respond by emphasizing statutory language subjecting to execution "interest[s] held directly or indirectly in a separate juridical entity." *See* Pet. Br. 14 (citing 28 U.S.C. § 1610(g)). But nothing in this language overrides the statute's express requirement that the property be "property of" the foreign state or agency or instrumentality. Rather, the language simply makes clear that an asset remains the foreign state's "property" even if the foreign state has chosen to own it indirectly through an intermediate entity. That the statute reaches indirectly owned property interests is consistent both with the district court's holding, namely that section 1610(g) only

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* The cited conference report is the report for H.R. 1585. That version of the NDAA was ultimately vetoed by the President because of his concerns that the attachment provision, as applied to Iraq, would interfere with Iraqi reconstruction efforts. *See* 154 Cong. Rec. 11-12 (2008). Two weeks later, Congress amended the bill so that it allowed the President to exempt Iraq from the applicability of section 1605A and 1610(g), and Congress otherwise left the relevant parts of the NDAA unaltered. *Compare* NDAA § 1083 *with* H.R. 1585, 110th Cong. § 1083 (enrolled bill, as sent to the President). As a result, the conference report for H.R. 1585 is highly probative as to the meaning of the NDAA; indeed, the NDAA expressly recognizes H.R. Rep. No. 110-447 (2007) as part of the NDAA's legislative history. *See* NDAA § 1(b).

reaches ownership interests, and with the legislative purpose of making assets owned by terrorism-supporting foreign states available to victims of terrorism, however those states structure their ownership. But ownership remains an indispensable element. To conclude otherwise would squarely contradict the independent statutory requirement that the asset being attached must be "property of" the relevant state.

Petitioners also rely on statutory language permitting attachment regardless of (1) the foreign government's "level of economic control" over the property; (2) whether the government receives "the profits of the property"; (3) the "degree" to which the government manages the property; (4) whether the government is the property's "sole beneficiary"; and (5) whether recognizing the separate entity "would entitle the foreign state to benefits in United States courts while avoiding its obligations." Pet. Br. 19-20 (quoting 28 U.S.C. § 1610(g)). Rather than eliminating the ownership element of section 1610(g), however, this language clearly supersedes the multi-factor test created in *First Nat'l City Bank v. Banco Para El Comerio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611 (1983), for determining when a creditor can look to the assets of a separate juridical entity to satisfy a claim against a foreign sovereign. *See Bancec*, 462 U.S. at 628-34 (in determining when to disregard separate juridical status, considering, *inter alia*, extent of foreign government control over the entity, and extent to which the foreign state was seeking benefits in U.S. courts while avoiding its burdens). Indeed, the statute's wording of these five factors—which the statute provides are irrelevant to an asset's availability for

attachment—almost identically track the five so-called "*Bancec* factors" discussed in *Walter Fuller Aircraft Sales, Inc. v. Republic of Phillippines*, 965 F.2d 1375, 1380 n.7 (5th Cir. 1992); *see also Flatow v. Islamic Republic of Iran*, 308 F.3d 1065, 1071 n.9 (9th Cir. 2002) (mentioning same five factors). All of these factors, however, concern whether attachment is authorized when the foreign state adopts an indirect form of ownership—not whether the statutory requirement of ownership can be dispensed with entirely.

Finally, petitioners rely on a brief footnote in *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1123 n.2 (9th Cir. 2010), characterizing section 1610(g) as reaching "any U.S. property in which" the judgment debtor "has any interests." But this statement was pure dicta—the case did not involve a section 1610(g) execution, and the court offered no supporting analysis whatsoever. This statement may lack precedential force even in the Ninth Circuit. *See, e.g., In re Magnacom Wireless, LLC*, 503 F.3d 984, 993-94 (9th Cir. 2007) ("statements made in passing, without analysis, are not binding precedent."). Because this passing unsupported statement badly misconstrues the provision's plain meaning, it should not be followed here.

POINT III

SECTION 1610(f)(1) HAS BEEN WAIVED AND IS NOT AN AVAILABLE BASIS TO ATTACH THE ASSETS AT ISSUE

The Court should reject petitioners' argument (Pet. Br. 58) that they can enforce their judgment under section 1610(f)(1)'s broader language. This argument is based on their mistaken assertion that TRIA renders the President's waiver of section 1610(f)(1) no longer effective. Section 1610(f)(3) unambiguously declares that "the President may waive any provision of paragraph (1) in the interest of national security." And the President specifically invoked that statute, the day it was enacted, to waive the entirety of section 1610(f)(1). *See Presidential Determination 2001-03*, 65 Fed. Reg. 66,483, 2000 WL 34508240 (Oct. 28, 2000) (waiver now in effect; *see also Presidential Determination 99-1*, 63 Fed. Reg. 59,201, 1998 WL 34332050 (Oct. 21, 1998) (superseded waiver of predecessor statute)).

Petitioners nonetheless contend that section 201(b)(1) of TRIA negated the President's waiver under section 1610(f)(3), by requiring that any waiver be on an asset-by-asset basis. *See* Pet. Br. 61 (quoting TRIA § 201(b)(1)). But section 201(b)(1) of TRIA is explicitly limited to the waiver of TRIA section 201(a), not other statutes. Section 201(b)(1) states: "upon determining on an asset-by-asset basis that a waiver is necessary . . . , *the President may waive the requirements of subsection (a)*" with regard to certain property. TRIA § 201(b)(1) (emphasis added). Thus, nothing in TRIA purports to amend 28 U.S.C. § 1610(f)(3), and the President's

October 2000 waiver of section 1610(f)(1) therefore remains in effect. Accordingly, petitioners may not collect under the purported authority of section 1610(f)(1).

CONCLUSION

This court should reject petitioners' argument that TRIA and section 1610(g) authorize the attachment of assets that are not owned by North Korea. Additionally, it should hold that section 1610(f)(1) has been waived by the President, rendering it unavailable for petitioners' use.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 6823 words in this brief.

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